No. 83-10

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

PRESSROOM UNIONS-PRINTERS LEAGUE INCOME SECURITY FUND,

Petitioner,

against

CONTINENTAL ASSURANCE CO., a Member of the C.N.A. Group, RESERVE LIFE INSURANCE CO., and its wholly owned subsidiary AMERICAN PROGRESSIVE LIFE & HEALTH INSURANCE COMPANY OF NEW YORK, GEORGE S. KRIEGLER, BENJAMIN A. KRIEGLER, LABOR SECURITY PROGRAMS, INC., and RAYMOND M. KRIEGLER deceased, by John Doe, Mary Moe and Roe Corp. 1-10, the true names of the preceding defendants being presently unknown to plaintiff, the foregoing fictitious names intending to designate the executors, administrators, trustees, successors in interest and heirs-at-law of the said Raymond M. Kriegler, deceased.

Respondents.

BRIEF IN OPPOSITION FOR RESPONDENTS GEORGE S. KRIEGLER, BENJAMIN A. KRIEGLER AND RAYMOND M. KRIEGLER

ROBERT STEPHAN COHEN*
DEBORAH E. LANS
Attorneys for Respondents
George S. Kriegler,
Benjamin A. Kriegler and
Raymond M. Kriegler
555 Madison Avenue
New York, New York 10022
(212) 421-0700

Of Counsel:
IRA LICHTIGER
LANS FEINBERG & COHEN

*Counsel of Record

QUESTION PRESENTED

Whether a district court has subject matter jurisdiction under section 502(e) of the Employee Retirement Income Security Act of 1974, *as amended*, 29 U.S.C. § 1132(e), over an action instituted by an employee benefit plan in the absence of a statutory grant of jurisdiction over such action and in light of the explicit and carefully tailored grant of federal jurisdiction over actions commenced by certain enumerated classes of concerned persons, *i.e.*, the participants, beneficiaries and fiduciaries of such plans and the governmental official charged with plan oversight?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Statutory Provisions: PAGE

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

No. 83-10

PRESSROOM UNIONS-PRINTERS LEAGUE INCOME INCOME SECURITY FUND,

Petitioner,

—against—

CONTINENTAL ASSURANCE CO., a Member of the C.N.A. Group, RESERVE LIFE INSURANCE CO., and its wholly owned subsidiary AMERICAN PROGRESSIVE LIFE & HEALTH INSURANCE COMPANY OF NEW YORK, GEORGE S. KRIEGLER, BENJAMIN A. KRIEGLER, LABOR SECURITY PROGRAMS, INC., and RAYMOND M. KRIEGLER, deceased, by John Doe, Mary Moe and Roe Corp. 1-10, the true names of the preceding defendants being presently unknown to plaintiff, the foregoing fictitious names intending to designate the executors, administrators, trustees, successors in interest and heirs-at-law of the said Raymond M. Kriegler, deceased,

Respondents.

BRIEF IN OPPOSITION FOR RESPONDENTS GEORGE S. KRIEGLER, BENJAMIN A. KRIEGLER AND RAYMOND M. KRIEGLER

Respondents George S. Kriegler, Benjamin A. Kriegler and Raymond M. Kriegler (deceased) oppose, for the reasons set forth below, the petition for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Second Circuit, entered on February 18, 1983, Petition for Rehearing denied on April 7, 1983, affirming the judgment entered pursuant to an Order of the United States District Court for the Southern District of New York, dated June 3, 1982, and its Opinion and Order, dated August 2, 1982.

STATEMENT OF THE CASE

This action presents a challenge to an investment decision made by the trustees of the Pressroom Unions—Printers League Income Security Fund (the "Fund"); petitioner-Fund alleges that the 1971 decision to purchase individual whole life insurance policies instead of a group term policy violated the Employee Retirement Income Security Act of 1974, as amended, 29 U.S.C. § 1001 *et seq.* ("ERISA"), and various state law provisions. No allegations of embezzlement, theft or any other like activity have been made.

The decision of the Court of Appeals of which review is sought held that federal courts lack subject matter jurisdiction over actions brought pursuant to ERISA § 502 by an "employee benefit plan," a potential plaintiff over whose claims no jurisdiction is granted by the express provision of ERISA § 502(e).[1] Both the Circuit and District Courts plainly rested their decisions on the lack of subject matter jurisdiction. Neither viewed § 502(e) as a standing provision and thus neither decision extended, as petitioner contends, to the issue of whether an employee benefit plan has standing to assert claims for breach of fiduciary duty under ERISA. *See* Petition at 3.

Eighteen days after the entry of the District Court's Order denying the Fund's motion to amend or alter the judgment of dismissal to permit amendment of the complaint, a second action was instituted by three trustees, participants and beneficiaries of the Fund, in which the plaintiffs make allegations identical to

1. Section 502(a), 29 U.S.C. § 1132(a) (quoted in the Petition at 2-3) is an elaborate standing provision which enumerates the proper plaintiffs to sue to enforce various specific rights and obligations. Section 502(e)(1) grants the district courts exclusive jurisdiction over certain § 502(a) actions "brought by a participant, beneficiary or fiduciary" and grants concurrent jurisdiction over other § 502(a) actions (without regard to the party initiating the suit). For the purpose of this opposing brief only, we assume that the plaintiff is an employee benefit plan within the meaning of 29 U.S.C. § 1002(3).

those advanced at bar. That action is presently being vigorously litigated before the United States District Court for the Southern District of New York. *See* Petition at 19, n.10.[2]

REASONS FOR DENYING THE PETITION FOR CERTIORARI

A. Introduction

This case involves an issue as to the proper interpretation of the jurisdictional grant contained in Subchapter I of ERISA, Protection of Employee Benefit Rights, ERISA § 502(e), 29 U.S.C. § 1132(e) (1975). Nevertheless, the petitioner's argument in support of its petition for certiorari primarily concerns an issue which was not decided by the Court below, the Fund's standing to sue. The Court of Appeals decided that the District Court lacked subject matter jurisdiction. Accordingly, it did not decide whether the Fund had standing to bring the action.

Petitioner's assertion that there is a conflict among the circuit courts of appeals rests on the incorrect assumption that a "standing" issue is involved. However, there is no conflict among the circuits with respect to the only question which may properly be presented here, whether the federal courts have jurisdiction over actions purportedly brought pursuant to ERISA by an employee benefit plan.

Moreover, the decision below, answering this question in the negative, is correct. Since there is no clear legislative mandate conferring such jurisdiction contained either in the plain language of the statute or in the legislative history, the lower Courts properly held they could not infer such jurisdiction, particularly in light of Congress' careful elaboration of the parties and claims for which federal jurisdiction is to lie.

---

2. Petitioner asks this Court to consider as a "necessary adjunct" to the jurisdictional issue, the Circuit Court's affirmance of the District Court's denial of the Fund's motion to amend the complaint. Petition at 9, n.3. Inasmuch as the latter issue is distinct from , and not necessarily raised by, the jurisdictional issue, and as petitioner has raised no independent reason for this Court's review of this issue, we will not discuss petitioner's request.

Finally, a decision by this Court with respect to this jurisdictional issue will not resolve any important issue of federal law or of public concern and might not even be significant with respect to the parties to this proceeding. The federal courts have jurisdiction over ERISA actions brought by participants, beneficiaries and fiduciaries, and since, as a practical matter, these parties would have to be involved in the institution of any action by a plan, merely requiring the interested parties to sue in their own names works no deprivation of access to the federal courts. For example, the participants and beneficiaries of the Fund are seeking relief in an action presently pending in the District Court for the Southern District of New York, instituted by three fiduciaries, participants and beneficiaries, in which allegations identical to those made here have been advanced.

B. The Second Circuit's Decision That Section 502(e) Defines The Parameters Of The District Court's Jurisdiction Does Not Conflict With The Decisions Of The Other Circuits

All of the cases cited by petitioner as evidencing a conflict among the circuits deal with questions of standing. None treats the jurisdictional issue to which the decision below was restricted. In each, the courts in fact had subject matter jurisdiction, unlike the District Court in this action, to decide the "standing" issue. Since the Court below decided an issue different from the "standing" issue decided by the other circuit courts, there is no conflict requiring this Court's resolution.

In *Fentron Indus., Inc.* v. *National Shopmen Pension Fund*, 674 F.2d 1300 (9th Cir. 1982), the action, as consolidated by the District Court, was brought by a class of employees-beneficiaries of the pension plan and an employer on behalf of its employees to enforce their rights under the plan (*i.e.*, a claim under ERISA § 502(a)(1)(B)). An employer, like the employee benefit plan at bar, is not specifically designated in section 502(e) as a party over certain of whose ERISA actions the courts are vested with

jurisdiction.[3] However, the *Fentron* court had no need to, and in fact did not purport to, decide the issue of whether it had jurisdiction over an ERISA action brought by an employer; included among the plaintiffs in *Fentron* were beneficiaries of the plan, and the federal courts plainly have jurisdiction over all ERISA-based actions instituted by beneficiaries. ERISA § 502(e).

The issue as framed by the *Fentron* court was whether an employer has standing to bring an action under ERISA. Section 502(e) was neither construed nor considered by the court. In determining the standing issue, the court applied the standard enunicated by this Court in *Association of Data Processing Serv. Org.* v. *Camp*, 397 U.S. 150, 153 (1970); it mentioned ERISA § 502(a) only in a passing suggestion that the section was not intended by Congress to be an exclusive list of those with standing to sue. *Fentron*, 674 F.2d at 1304-05.

Petitioner's contention that the *Data Processing* standard should have been applied by the Court below, *see* Petition at 15, ignores the essential distinction between the decisions below and *Fentron*. The Second Circuit's decision was restricted to the jurisdictional issue, whereas the *Fentron* decision was confined to the non-statutory issue, as the court framed it, of the employer's standing to sue. The Circuit Court below applied the standard established by this Court for construing statutory jurisdictional grants:

> It is beyond dispute that only Congress is empowered to grant and extend the subject matter jurisdiction of the federal judiciary, and that courts are not to infer a grant of jurisdiction absent a clear legislative mandate. *Rice* v. *Railroad Co.*, 66 U.S. (1 Black) 358, 374 . . . (1861); *Dalehite* v. *United States*, 346 U.S. 15, 30-31 . . . (1953); *see also Middlesex County Sewerage Authority* v. *National Sea Clammers Assoc.*, 453 U.S. 1, 13-18 . . .

3. Section 502(e)(1) (second sentence) grants concurrent federal jurisdiction over *Fentron*-type claims without regard to the nature of the party asserting them.

> (1981). We therefore decline to construe §1132(d)(1) as *sub silentio* conferring jurisdiction over actions brought by parties other than those specified in §1132(e)(1).

700 F.2d at 892.

That the Court applied a standard different from that applied by the *Fentron* court does not create a conflict; the different standards were applied to different issues.

Similarly, in *Peoria Union Stock Yards Co. Retirement Plan* v. *Penn Mutual Life Ins. Co.*, 698 F.2d 320 (7th Cir. 1983), the pension plan and its trustees and beneficiaries sued an insurance company alleging violations, *inter alia*, of federal and state securities laws and of ERISA. Since the plaintiffs included beneficiaries, the *Peoria* court had subject matter jurisdiction pursuant to ERISA §502(e). In reversing the district court's judgment dismissing the amended complaint for failure to state a claim (and not for lack of jurisdiction), the court stated *without discussion*: "[t]he participants, the trustees, and the plan itself all have *standing* to complain of such a breach. *See*, 29 U.S.C. §1109(a), 1132(a), (d)(1)." *Id.* at 326 (emphasis supplied).

In *Associated Builders & Contractors* v. *Carpenters Vacation and Holiday Trust Fund for N. Cal.* 700 F.2d 1269 (9th Cir. 1983), an employer organization and several employers sued alleging that a collective bargaining provision violated the Labor Management Relations Act ("LMRA") and ERISA. Since the action was brought under the LMRA and ERISA, the court had jurisdiction over the LMRA claim pursuant to 28 U.S.C. §1331 and pendent jurisdiction over the ERISA claim. *See Hagans* v. *Lavine*, 415 U.S. 528, 536 (1974); *Finnerty* v. *Cowen*, 508 F.2d 979, 984 (2d Cir. 1974).[4] As in *Fentron* and *Peoria*, therefore, the *Associated Builders* court had no need to and did not address the issue of whether the district court had jurisdiction pursuant to ERISA §502(e) over an action instituted by employers. The court resolved the issue of whether the employers had standing to sue in accordance with the circuit's earlier decision in *Fentron*.

4. Petitioner did not assert below, as a separate jurisdictional basis, 28 U.S.C. §1331. *See* 700 F.2d at 892, n.7.

In the only case relied upon by petitioner which involved a jurisdictional issue, *United States Steel Corp.* v. *Commonwealth of Pennsylvania Human Rel. Comm'n*, 669 F.2d 124 (3d Cir. 1982), the court held that the district court had jurisdiction pursuant to ERISA §502(e) over an action brought by an employer because it was also a fiduciary of the fund.[5] It did not hold that an employer *qua* employer could invoke the court's jurisdiction and, therefore, this decision does not conflict with the decision below.[6]

There are additional distinctions which further undermine the asserted conflict among the circuits. The plaintiffs whose standing to sue was in issue in all but one of the cases relied upon by petitioner were employers, as distinguished from the employee benefit plan here. The Court below recognized that even though it had stated in an earlier decision that an employer may not bring suit under ERISA, *Stone & Webster Eng'g Corp.* v. *Ilsley*, 690 F.2d 323 (1982), the *Stone* decision did not resolve the dispute before it concerning an action brought by a plan. *See* 700 F.2d at 892.

In the only case cited by petitioner in which an employee benefit plan brought the suit, *Peoria, supra,* the plaintiffs also included plan trustees and beneficiaries and therefore there was

---

5. In *United States Steel,* an employer sued to enjoin, on grounds of preemption, the state human relations commission from pursuing charges that the employer's employee benefit plan did not treat pregnancy on a parity with other non gender-based disabilities. It would seem that federal jurisdiction over such a suit is beyond dispute. *Shaw* v. *Delta Airlines, Inc.*, 51 U.S.L.W. 4968, 4970 n.14 (U.S. June 24, 1983) (No. 81-1578).

6. Petitioner did not contend below that a fund can be a beneficiary, participant, or fiduciary. *See* Petition at 13, n.5. Therefore, the Court should not consider this argument here. The suit below was instituted by an employee benefit plan alleging as the sole basis for federal jurisdiction ERISA §502 (and principles of pendent jurisdiction). Consequently, the Court was required to decide the jurisdictional issue which was not before the *Peoria, Fentron* and *Associated Builders* courts. Since it decided that the District Court lacked jurisdiction, it did not have to decide whether the Fund had standing to bring the suit. The Court's limited references to the standing section of the statute, ERISA §502(a), was therefore dictum, included in the decision only to aid in its determination of the jurisdictional issue.

no jurisdictional issue before the court. Moreover, the *Peoria* court did not have occasion to consider even the standing issue closely, for, whether or not the plan had standing, the other plaintiffs clearly could sue properly under ERISA §502(a).

Accordingly, no conflict can be said to exist between the Second Circuit's decision below and the decisions of the Ninth, Seventh and Third Circuits cited by petitioner.

C. The Decision Below That The District Court Lacked Jurisdiction Over The Action Instituted By The Fund Is Correct

Consistent with the "spirit of necessity and careful limitation of district court jurisdiction that informed" this Court's decision in *Franchise Tax Board of the State of Cal.* v. *Construction Laborers Vacation Trust for S. Cal.*, 51 U.S.L.W. 4945, 4951 (June 24, 1983) (No. 82-695), the Court below was correct in finding that it could not "infer a grant of jurisdiction absent a clear legislative mandate." 700 F.2d at 892. Indeed, as this Court wrote in *Franchise Tax Board*: "[t]he express grant of federal jurisdiction in ERISA is limited to suits brought by certain parties . . ." and cannot be judicially expanded. *Franchise Tax Board*, 51 U.S.L.W. at 4951.

Outlining the statutory scheme, this Court in *Franchise Tax Board*, wrote:

> The express grant of federal jurisdiction in ERISA is limited to suits brought by certain parties, see *infra*, at , as to whom Congress presumably determined that a right to enter federal court was necessary to further the statute's purposes.[23] . . . ERISA contains provisions creating a series of express causes of action in favor of participants, beneficiaries, and fiduciaries of ERISA-covered plans, as well as the Secretary of Labor. §502(a), 29 U.S.C. §1132(a).[24]. . . The phrasing of §502(a) is instructive. Section 502(a) specifies which persons—participants, beneficiaries, fiduciaries, or the Secretary of Labor—may bring actions for particular kinds of relief. . . . It does not purport to reach every question relating to plans covered by ERISA. Furthermore,

> §514(b)(2)(A) of ERISA, 29 U.S.C. §1144(b)(2)(A), makes clear that Congress did not intend to preempt entirely every state cause of action relating to such plans.

Id. at 4951-52.

Specifically, concerning jurisdiction, this Court wrote:

> The statute further states that "the district courts of the United States shall have exclusive jurisdiction of civil actions under this subchapter brought by the Secretary or by a participant, beneficiary, or fiduciary," except for actions by a participant or beneficiary to recover benefits due, to enforce rights under the terms of a plan, or to clarify rights to future benefits, over which state courts have concurrent jurisdiction.

Id. at n.26.

In *Franchise Tax Board* this Court held that federal "arising under" jurisdiction does not exist over an action by a state agency against an employee benefit plan seeking a declaration that enforcement of certain state tax laws was not preempted by ERISA. In holding federal jurisdiction lacking, the Court wrote:

> ERISA carefully enumerates the parties entitled to seek relief under §502; it does not provide anyone other than participants, beneficiaries, or fiduciaries with an express cause of action for a declaratory judgment on the issues in this case. A suit for similar relief by some other party does not "arise under" that provision.

Id. at 4952.

Similarly, the Court below found that there was no clear legislative mandate conferring jurisdiction over ERISA actions instituted by pension funds either on the face of the jurisdictional provision, section 502(e), or in the legislative history; the Circuit Court concluded, accordingly, that section 502(d)(1) cannot *sub silentio* confer such jurisdiction, as petitioner urges. *See* 700 F.2d at 891-892.

Section 502(d)(1) provides in pertinent part that "[a]n employee benefit plan may sue or be sued under this subchapter as an entity." Both the District Court and the Court of Appeals

recognized that section 502(d) does not address the Courts' jurisdiction but only the legal capacity of a plan to sue or be sued. *See* petitioner's Supplemental Appendix at 17a; *see* 700 F.2d at 893. The seeming ambiguity between §§502(d) and (e) was resolved by the District Court by finding that a plan might, under some circumstances, also be a participant, beneficiary or fiduciary. Under those circumstances, a federal court would have jurisdiction over a plan's action under section 502(e), and section 502(d) would give the plan capacity to sue.

The Circuit Court construed section 502(d) to authorize suits by funds, in state or federal courts, in situations where there would properly be jurisdiction; suits might lie, for example, for breach of a fund's commercial contractual obligations or under a lease, if the fund is a tenant, and such actions would plainly be among those not reached, or preempted by ERISA. *Franchise Tax Board*, 51 U.S.L.W. at 4952. Therefore, such claims would be outside ERISA's jurisdiction-granting provisions. *Id.* Section 502(d) nevertheless might be necessary to confer legal capacity upon a trust-created enterprise which might not be recognized as a legal entity under the laws of each of the fifty states.[7]

Another appropriate resolution for this superficial ambiguity may be that where a federal court's jurisdiction is invoked by a fiduciary, beneficiary or trustee pursuant to section 502(e), the action may be brought by him, her or it on behalf of the plan. Additionally, since, as an entity, a plan may be sued under this subchapter in an action over which a federal court would have jurisdiction pursuant to section 502(e), section 502(d) grants the Fund the *capacity* to counterclaim and defend.

7. This suggestion is supported by the second sentence of §502(e)(1) which does not limit the federal courts' concurrent jurisdiction over benefit enforcement and clarification cases under §502(a)(1)(B) to those brought by particular classes of persons. *Indeed*, one view of *Fentron* is that it was a benefit case falling within this observation.

Regardless of which of these interpretations is accepted, it is clear that the court below was correct in finding that section 502(d) cannot, *sub silentio*, extend federal jurisdiction to actions brought by an employee benefit plan.[8]

D. No Important Matter of Federal Law Or Public Concern Is Involved At Bar

Decision with respect to this jurisdictional issue does not present an important question of federal law nor does it involve issues of public importance. Pursuant to the explicit jurisdictional

8. Further persuasive support for the holding below may be found in *Rheingold Breweries Pension Plan* v. *Pepsi Co., Inc.*, 2 E.B.C. (BNA) 2411 (S.D.N.Y. Nov. 17, 1981), in which the court found that section 502(d) could not be construed to confer on employee benefit plans *standing* to sue:

> While the lack of qualifying language in Section 502(d)(1) ("may sue or be sued *under this subchapter* as an entity" (emphasis added)) perhaps suggests a congressional intent to grant the broadest of powers to plans under the Act, the specificity of Section 502(a) [the "standing" section] as to who may bring what type of suit in which situation suggests a contrary inference. Thus, under 502(a)(3), participants, beneficiaries or fiduciaries may seek equitable remedies to enforce any provision of Subchapter I; under 502(a)(2), participants, beneficiaries, fiduciaries *and* the Secretary of Labor may seek appropriate relief for breach of fiduciary duty; and under 502(a)(1), *only* participants or beneficiaries may sue to recover benefits due under the terms of a plan. The detail of this section suggests a congressional intent to limit and control litigation under the statute. The absence of employee benefit plans from this scheme argues against standing in this case. Parallel sections in the Act further suggest that a restrictive reading of Section 502(a) is appropriate. Under Section 502(h) of the Act, 29 U.S.C. §1132(h) (1976), copies of complaints in actions under Subchapter I brought by a "participant, beneficiary or fiduciary" are to be served upon the Secretaries of Labor and Treasury by certified mail. Either Secretary then has the "right in his discretion to intervene in any action...." The expansive reading of Section 502(d)(1) urged by plaintiff in this case would leave employee benefit plans exempt from the requirements of Section 502(h)—with the unlikely result that suits by plans under Subchapter I would be uniquely immune from the Secretaries' scrutiny and supervision.

Id. at 2411.

grant contained in ERISA §502(e), the district courts have jurisdiction over actions brought by participants, beneficiaries and fiduciaries of employee benefit plans. Notwithstanding that such plans have been deemed entities under ERISA §502(d), they nevertheless cannot institute a federal action without the aid of the parties enumerated in section 502(e) absent an independent basis for jurisdiction. Petitioner's contention that millions of unprotected participants and beneficiaries stand to be disenfranchised because "trustees may have various practical reasons for not bringing an action like this in their own name," Petition at 19, is without merit. First, trustees owe a fiduciary duty to the plan to institute actions where appropriate. Moreover, participants and/or plan beneficiaries may sue without the joinder of plan fiduciaries.

Franchise Tax Board suggests that as a matter of definition the jurisdictional argument raised by petitioner here is not of great import. In *Franchise Tax Board*, a plan and its trustees were sued in state court and sought to invoke the federal court's jurisdiction by removal. In remanding, this Court wrote:

> The express grant of federal jurisdiction in ERISA is limited to suits brought by certain parties, see *infra* at , as to whom Congress presumably determined that a right to enter federal court was necessary to further the statute's purposes. It did not go so far as to provide that any suit *against* such parties must also be brought in federal court. . . .

Franchise Tax Board, 51 U.S.L.W. at 4951.

Finally, even the individual interests involved in this action are adequately protected by the action instituted by Fund trustees, participants and beneficiaries, which is presently pending in the District Court for the Southern District of New York.[9]

For these reasons, the jurisdictional issue at bar lacks the requisite importance for consideration by this Court.

---

9. Petitioner's assertion that "[n]umerous cases may presently be pending whereby funds have sued as entities under ERISA," Petition at 19, is made without substantiation.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

ROBERT STEPHAN COHEN
DEBORAH E. LANS
Attorneys for Respondents
555 Madison Avenue
New York, New York 10022

IRA LICHTIGER
LANS FEINBERG & COHEN
Of Counsel

Dated: August 5, 1983